Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	CG Docket No. 02-278
Petitions for Declaratory Ruling and Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv) Regarding the Commission's Opt-Out Notice Requirement for Faxes Sent with the Recipient's Prior Express Permission	)	CG Docket No. 05-338

OPPOSITION TO APPLICATION FOR REVIEW

Pursuant to Section 1.115 of the rules of the Federal Communications Commission ("Commission"), Essendant, Inc. (f/k/a United Stationers Inc.) and Essendant Co. *(f/k/a* United Stationers Supply Co.) (collectively, "United")[1] hereby submits this Opposition to the Application for Review filed by Craftwood II, Inc., dba Bay Hardware, and Craftwood Lumber Company (collectively, "Craftwood"). In its Application, Craftwood requests that the Commission review the August 28, 2015 Order issued by the Consumer and Government Affairs Bureau granting retroactive waivers of Section 64.1200(a)(4)(iv) to 117 petitioners, including United, for faxes sent with the express consent of recipients prior to April 30, 2015.[2]

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1 United Stationers and United Stationers Supply Co. originally filed their petition in May of 2015. After filing the petition, the companies changed their name to Essendant, Inc. and Essendant Co. For continuity, Essendant uses its former name, United, throughout this reply.

2 *See In re Matter of Petitions for Declaratory Ruling and Retroactive Waiver of 47 C.F.R. §64.1200(a)(4)(iv) Regarding the Commission's Opt-Out Notice Requirement for Faxes Sent with the Recipient's Prior Express Permission*, Order, DA 15-976 (Aug. 28, 2015) ("August 28 Order").

Craftwood provides no valid basis for the Commission to review, much less, overturn, the August 28 Order. The Bureau order follows directly from the Commission's conclusions in its October 30, 2014 solicited fax order ("*Solicited Fax Order*"). The Bureau simply determined that petitioners demonstrated they were similarly situated to the parties already granted the same relief by the Commission. The Bureau's decision is completely consistent with the TCPA, the *Solicited Fax Order*, and established precedent. Nor does Craftwood raise any policy concern that the FCC hasn't already addressed. Craftwood seeks to collaterally challenge the *Solicited Fax Order*, an order that is under review in the D.C. Circuit. That proceeding is the only place where such arguments can properly be heard. For these reasons, and those stated below, Craftwood's Application for Review should be denied.

BACKGROUND

In 2006, in its *Junk Fax Order*, the Commission amended its rules to incorporate the changes in the Junk Fax Prevention Act ("JFPA"). Among other things, in the *Junk Fax Order*, the Commission purportedly adopted a rule that provided that a fax advertisement "sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice."[3] The Junk Fax Order, however, also contained conflicting language in a footnote that "the opt-out notice requirement only applies to communications that constitute unsolicited advertisements."[4]

Numerous parties filed petitions seeking clarification of the Commission's rule with regard to opt-out notices in solicited faxes. On October 30, 2014, the Commission issued

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3 47 C.F.R. § 64.*1200*(a)(4)(iv).

4 *Junk Fax Order*, 21 FCC Rcd. at 3810 n.154 (emphasis added).

an Order concluding that the rules adopted by the FCC in 2006 apply not only to unsolicited fax advertisements, but also to solicited fax advertisements (*i.e.*, fax advertisements sent with the recipients' prior express invitation or permission).[5] The Commission also denied petitioners' request for declaratory ruling that Section 227(b) of the TCPA could not be the statutory basis for that requirement, and concluded that the Commission had authority to adopt the rule in question.

At the same time, the Commission granted retroactive waivers to several petitioners who were facing lawsuits alleging that they had violated Section 64.1200(a)(4)(iv) by failing to include the required "opt-out" language in advertising faxes. The FCC determined that, because of potential confusion regarding whether the opt-out language was required in solicited fax advertisements, good cause existed for a retroactive waiver, and that a waiver was also in the public interest.

Following the *Solicited Fax Order*, over 100 parties filed petitions claiming they were similarly situated to the parties before the FCC when the Solicited Fax Order was issued. Many individual and corporate consumers, including Craftwood, filed comments opposing the petitions. They argued petitioners were not similarly situated because: (1) they have not and/or cannot establish that they received the prior express permission or consent of fax recipients; (2) they do not specifically assert they were confused, or that the source of their purported confusion was the two factors outline in the *Solicited Fax Order*.[6] Additionally, several

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5 *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Order, 29 FCC Rcd 13998, FCC 14-164, ¶¶ 26-28 (Oct. 30, 2014) (the "*Solicited Fax Order*").

6 *August 28 Order*, ¶ 9.

commenters "reiterate[d] arguments raised prior the release of the *Solicited Fax Order* and argue that the Commission does not have authority to waive its regulations in a private right of action and that doing so violates the separation of powers."[7] After considering the petitions and comments on the petitions, on August 28, 2015 the Bureau granted waivers to 117 petitioners, including United.

ARGUMENT

Section 1.115 of the FCC's rules requires an application for review to satisfy one of five criteria to warrant Commission consideration. 47 U.S.C. § 1.115(b)(2). Pursuant to those rules, an application may be granted only if the Bureau action: (i) is in conflict with statute, regulation, case precedent, or established Commission policy, (ii) involves a question of law or policy which has not previously been resolved by the Commission, (iii) involves application of a precedent or policy which should be overturned or revised, (iv) includes an erroneous finding of material fact, or (v) constitutes prejudicial procedural error. *Id.* Craftwood makes no attempt to explain which of these factors warrant review. Regardless of this procedural deficiency, none of Section 1.115's criteria are satisfied here.

I. THE AUGUST 28 ORDER IS NOT INCONSISTENT WITH ANY STATUTE, REGULATION, CASE PRECEDENT OR COMMISSION POLICY.

The Bureau's August 28 Order does not conflict with the TCPA, and is entirely consistent with the *Solicited Fax Order*, precedential case law, and established Commission rules and policy.

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7 *Id.*, n. 40 (citing comments, including those submitted by Craftwood).

A. The Bureau Followed Clear Commission Precedent.

Far from deviating from established precedent, the Bureau explicitly followed the Commission's precedent in granting the waiver to United (and 116 other parties). The Commission found in the *Solicited Fax Order* that a retroactive waiver was justified with regard to the application of the opt-out notice requirement to solicited faxes.[8] Specifically, the FCC acknowledged that the "inconsistent footnote" in the *Junk Fax Order,* which stated that the opt-out notice requirement applied only to *unsolicited* advertisements, "caused confusion or misplaced confidence regarding the applicability of the [opt-out notice] requirement."[9] The Commission also recognized that "the lack of explicit notice" in the notice of proposed rulemaking that the Commission contemplated requiring opt-out notices on solicited fax advertisements "may have contributed to confusion or misplaced confidence."[10] The FCC concluded that "this specific combination of factors *presumptively* establishes good cause for retroactive waiver of the rule."[11]

The Commission likewise determined that granting the requested retroactive waivers would also serve the public interest, noting that "the TCPA's legislative history makes clear our responsibility to balance legitimate business and consumer interests."[12] Examining the record set forth by petitioners, the Commission found it would be "unjust or inequitable" to

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8 *See Solicited Fax Order*, ¶¶ 26-27

9 *Solicited Fax Order*, ¶¶ 24, 28.

10 *Id.*, ¶ 25.

11 *Id.*, ¶ 26 (emphasis added).

12 *Id.*, ¶ 27.

subject parties to "potentially substantial damages," given the confusion and misplaced confidence about the rule's applicability.[13] The Commission then stated that "[o]ther, similarly situated parties may also seek waivers such as those granted" in the *Solicited Fax Order,* and directed that it "expect[s] that parties will make every effort to file [petitions for waiver] within six months of the release of this Order."[14] These findings were well within the scope of the Commission's authority, and in issuing the August 28 Order, the Bureau relied on similar reasoning and similar authority. Indeed, the Bureau was compelled to respond to United's petition (and the other 116 petitions) in this way. To do otherwise would have contradicted the *Solicited Fax Order* and thus would have been beyond the Bureau's delegated authority.

B. The August 28 Order Did Not Violate Separation of Powers.

Craftwood's second argument – that the waiver violates the separation of powers – also was decided by the *Solicited Fax Order*. Craftwood claims that the Bureau's August 28 Order dictates a rule of decision to the judiciary[15] – it does not. To the contrary, the Bureau merely determined that to the extent proper consent was obtained, petitioners qualified for retroactive waivers for the same reasons as the initial waiver recipients – *i.e.*, (1) inconsistency between a *Junk Fax Order* footnote and the rule, and (2) the notice provided prior to the rule did not make explicit that the Commission contemplated an opt-out requirement on fax ads sent with the prior express permission of the recipient. The Bureau explicitly reiterated, however, that "the granting of a waiver does not confirm or deny whether the

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13 *Id.*, ¶¶ 27, 28.

14 *Solicited Fax Order*, ¶ 30.

15 Application for Review, at 9.

petitioners had the prior express permission of the recipients to send the faxes. That remains a question for triers of fact in the private litigation."[16] Thus, the Bureau limited itself to interpreting the meaning of Commission rules, and did not in any way usurp the role of the judiciary.

Ironically, it is Craftwood who asks the Bureau to encroach upon the role of judiciary, and adjudicate whether petitioners like United obtained prior express permission from individual parties.[17] Craftwood complains: "to the extent the Commission has the authority to issue a waiver, it is for the Commission to decide whether there are facts to support it. Kicking the issue to the courts in private litigation does not discharge this responsibility."[18] Thus, while Craftwood claims the Bureau violated separation of powers by issuing the waiver to United, almost in the same breath, it demands that the Bureau act as the trier of fact with respect to a key element of its TCPA claim – prior express consent. These two positions cannot be reconciled.

Moreover, the Bureau in no way stepped into the role of Congress, or abrogated Congress' intent in passing the TCPA. The opt-out notice requirement waived by the Bureau is based on an FCC Rule, not the TCPA statute, and thus cases dealing with the authority of the Commission to waive a statute are inapposite.[19] Indeed, the TCPA statute does not address

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16 *August 28 Order*, ¶ 17.

17 Application for Review, at 16.

18 *Id.*

19 Application for Review, at 10 (*citing In re Maricopa Comm. College Dist. Request for Experimental Authority to Relax Standards for Public Radio Underwriting Announcements on KJZZ (FM) and KBAQ (FM)*, Phoenix Arizona, FID Nos. 40095 &

solicited faxes, which is why many of the original Anda petitioners challenged the FCC's authority under Section 227(b) to issue the *Junk Fax Order* in the first place. Craftwood's reliance on *Physicians Healthsource, Inc. v. Stryker Sales Corp.* ("Stryker") is therefore misplaced. In *Stryker*, the court assumed that the TCPA's opt-out notice was a statutory requirement rather than a requirement created by the Commission's rules. The *Solicited Fax Order* held that the requirement is a rule, adopted to implement the statute's goals. Further, to the extent that the court (a district court) held the Commission lacked the authority to grant a waiver of its own rules, the court exceeded its jurisdiction. Higher courts have found that "district courts lack jurisdiction to consider claims to the extent they depend on establishing that all or part of an FCC order subject to the Hobbs Act is 'wrong as a matter of law' or is 'otherwise invalid.'"[20]

Likewise, the holding in *National Resources* Defense *Council v. EPA* ("NRDC") is easily distinguished. In *NRDC*, the EPA was attempting to create a new defense to a private right of action. Here, the Bureau has granted temporary waiver from application of a Commission rule, due to confusion created by conflicting language in a Commission Order. Despite Craftwood's attempts to equate this case to NRDC, neither the Commission, nor the Bureau, is creating an affirmative defense of "confusion" or "misplaced confidence."[21] Far from it, the Commission (and Bureau) have simply recognized that the *Junk Fax Order* created

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40096, Mem. Op. & Order (rel. Nov. 24, 2004) (holding that "[t]he Commission's power to waive its own Rules cannot confer upon it any authority to ignore a statute.")

20 *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1120 (11th Cir. 2014).

21 Application for Review, at 13.

confusion among companies about the applicable legal standard. That is why the waivers granted by the Commission and Bureau only apply to faxes sent prior to April 30, 2015, and make clear that full compliance with the requirement to provide opt-out notices on fax ads sent with prior express permission is expected now that any potential for confusion on this point has been addressed.[22] Moreover, in *NRDC*, the court was dealing with a different agency (the EPA), and a disparate statutory scheme. Unlike the current action, the EPA could not rely on any authority that was as broad or well-established as the Commission's waiver authority. Therefore, neither the *Stryker* nor *NRDC* case is persuasive when determining the Commission (or Bureau's) waiver authority.

II. THE APPLICATION FOR REVIEW DOES NOT IMPLICATE ANY QUESTION OF LAW OR POLICY NOT PREVIOUSLY RESOLVED BY THE SOLICITED FAX ORDER.

The questions of law or policy that underlie Craftwood's Application for Review were all previously resolved by the Commission in the *Solicited Fax Order*. In particular, the Commission previously determined that it may waive its rules retroactively for good cause shown.[23] The Commission also previously determined that good cause existed to waive its rules due to: (1) inconsistency between a *Junk Fax Order* footnote and the rule, and (2) the Commission's failure to provide explicit notice that the Commission contemplated an opt-out

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22 *August 28 Order*, ¶ 21.

23 *See Solicited Fax Order*, ¶ 22 (citing 47 U.S.C. § 227 (b)(2) ("By addressing requests for declaratory ruling and/or waiver, the Commission is interpreting a statute, the TCPA, over which Congress provided us authority as the expert agency." ... The TCPA's authorization of private actions "does not undercut our authority, as the expert agency, to define the scope of when and how our rules apply.")

requirement on fax ads sent with the prior express permission of the recipient.[24] It was this specific combination of factors which the Commission found "**presumptively** establishes good cause for retroactive waiver of the rule."[25]

Craftwood takes the Commission's statement that: "simple ignorance of the TCPA or the Commission's attendant regulations is not grounds for waiver," completely out of context, and claims some inconsistency.[26] There is none. The Commission was merely explaining that it was not simple ignorance of the law, but rather the Commission's inconsistent footnote and lack of notice, that created the grounds for waivers. Indeed, the Commission did not need to engage in an individualized inquiry into each petitioner's state of mind; rather, it acknowledged the contradictory language in the footnote, and noted there was no record evidence to the contrary as to petitioner's knowledge.[27] The Bureau applied exactly the same reasoning in the August 28 Order.[28]

Even the issue of timeliness of the waiver petition was previously addressed by the Commission in the *Solicited Fax Order*, when it refused to adopt a fixed deadline for filing additional waiver petitions, and instead stated that it would not prejudge the outcome of such requests.[29]

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24 *Solicited Fax Order*, ¶ 24.

25 *Id.*, ¶ 26 (*emphasis added).*

26 Application for Review, at 19.

27 *Solicited Fax Order*, ¶ 26, n. 92.

28 *August 28 Order*, ¶ 15.

29 *Solicited Fax Order*, ¶ 30, n.1.

Thus, there is simply no reason for the Commission to review the issues Craftwood raises. All of its arguments have been previously considered, and decided, as part of the *Solicited Fax Order*.

III. THE APPLICATION PROVIDES NO BASIS TO OVERTURN OR REVISE EXISTING PRECEDENT OR POLICY.

Craftwood's Application asks the Commission to overturn the Bureau's Order because it sets a precedent that is against public policy.[30] Specifically, Craftwood contends it is against public policy because Craftwood relied in good faith on the Commission's April 30 "deadline" to file waiver petitions when it brought suit against United on May 1.[31] But, despite Craftwood's assertions to the contrary, the Bureau's decision did not "pull[] the rug from underneath" Craftwood, nor was it arbitrary and capricious. Craftwood ignores that the Commission never actually set a fixed deadline, and in fact noted that "all future waiver requests will be adjudicated on a case-by-case basis."[32] Thus, Craftwood had no right to rely on its ability to bring suit against United, based on faxes sent prior to April 30, 2015 with immunity from any possible waiver petition. Indeed, it would have been against public policy for the

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30 *Application for Review*, at 2, 5, 7.

31 *Application for Review*, at 7.

32 *Id.*, n. 102. The *Solicited Fax Order* simply does not contain the deadline Craftwood alleges. In the Order, the Commission stated that "[o]ther, similarly situated parties, may also seek waivers" such as those granted to Anda and other petitioners. It invited all similarly situated parties to seek a waiver. Although the FCC expressed its expectation that parties would file by April 30th, this expectation hardly was a deadline. In fact, all the Commission stated was that it expected similarly situated parties to "make every effort" to file within that timeframe and pledged that "all future waiver requests will be adjudicated on a case-by-case basis." This statement properly recognizes that Section 1.3 requires the Commission to consider each petition, whenever it is filed, on its own merits. That is precisely what the Bureau did in the August 28 Order.

Bureau not to consider United's petition simply because it was filed after this arbitrary deadline, when United was "similarly situated" to the original petitioners.

Craftwood further contends it is against public policy to grant the waiver to United because the public interest of businesses like Craftwood in obtaining compensation for TCPA violations outweighs the competing public interest in protecting parties from substantial damages if they violated the opt-out notice due to confusion or misplaced confidence.[33] This contention is entirely self-serving, and contradicted by the conclusions of the Commission in issuing the *Solicited Fax Order*. Moreover, Craftwood's argument that the Bureau's waiver of the opt-out notice requirements on faxes sent with prior express permission is against public policy because the same fax may have gone to some recipients who did not give permission, or who merely had an established business relation, is nonsensical.[34] The August 28 Order is clear that it does not provide any waiver as to those faxes for which there was no prior express permission.

IV. CRAFTWOOD POINTS TO NO ERRONEOUS FINDING OF MATERIAL FACT OR PROCEDURAL ERROR.

Craftwood's Application does not contest any finding of fact made by the Bureau. Nor could it, because the Bureau made no such findings. Similarly, the Craftwood Application does not suggest that the August 28 Order involved a procedural error. The only possible procedural argument made by Craftwood is that United's petition is time barred, which it is not, as explained in Section III, above.

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33 *Application for Review*, at 21.

34 *Id.* at 22.

CONCLUSION

For all of these reasons, United respectfully requests that the Commission deny Craftwood's Application for Review.

Respectfully submitted,

By: _____

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Dated: October 13, 2015

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of October, 2015, I caused to be served the attached Defendant's Opposition to the Application for Review filed by Craftwood II, Inc., *d/b/a* Bay Hardware, and Craftwood Lumber Company via Electronic Mail in accordance with the Rules of the Federal Communications Commission, upon the following parties and participants:

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